Attorney General
Betty D. Montgomery

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April 16, 1997

Via Overnight Mail

Office of the Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended; and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area,* CC Docket No. 96-149

Dear Mr. Caton:

Enclosed please find the original and three copies of the **Comments of the Public Utilities Commission of Ohio** in the above-referenced matter. Please return a time-stamped copy to me in the enclosed stamped, self-addressed envelope.

Thank you for your assistance in this matter.

Respectfully submitted,

Betty D. Montgomery
Attorney General Of Ohio

Ann E. Henkener
Assistant Attorney General
Public Utilities Section
180 East Broad Street
Columbus, OH 43215-3793
(614) 466-4396
FAX: (614) 644-8764

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Enclosure
cc: Janice Myles, Common Carrier Bureau
International Transcription Services, Inc.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended; and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area	)	CC Docket No. 96-149

COMMENTS SUBMITTED BY PUBLIC UTILITIES COMMISSION OF OHIO

INTRODUCTION AND BACKGROUND

On April 3, 1997, the Federal Communications Commission (FCC) released a Public Notice (Notice) in CC Docket No. 96-149 (Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended; and regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area) requesting comments in connection with an expedited reconsideration of its interpretation of section 272(e)(4) of the Telecommunications Act of 1996. Section 272(e)(4) indicates that a Bell Operating Company (BOC) and an affiliate that is subject to section 251(c) may provide any interLATA or intraLATA facilities or services to its interLATA affiliate if such services or facilities are made available to all carriers at the same rates and on the same terms and conditions, so long as the costs are appropriately allocated.

The FCC recently determined that section 272(e)(4) is not a grant of authority for a BOC to provide interLATA services prior to receiving section 271 authority (i.e., BOC Entry Into InterLATA Service). The FCC's decision was challenged, by certain BOCs, to the U.S. Court of Appeals for the District of Columbia (the Court).

The FCC requested that the Court permit it to reconsider its interpretation of section 272(e) since some of the BOCs' arguments had not been clearly presented to the FCC. On March 31, 1997, the Court granted the FCC's request. Consequently, the FCC responded by issuing the above-mentioned Notice requesting comments. Comments in response to the FCC's Notice are due at the FCC on April 17, 1997.

The Public Utilities Commission of Ohio (PUCO) hereby submits its comments pursuant to the FCC's Notice in CC Docket No. 96-149. Specifically, the PUCO responds to the FCC's request for comments on whether section 272(e)(4) of the Communications Act of 1934 as amended by the Telecommunications Act of 1996 grants authority for a Bell Operating Company to provide interLATA services prior to receiving section 271 authority, and whether section 272(e)(4) is a grant of authority for a BOC to provide interLATA services, including wholesale interLATA services provided to its interLATA affiliate, after receiving section 271 authority. The FCC requests comments on four specific areas of interest, and further invites parties to comment on any additional general relevant issues.

GENERAL COMMENTS

The PUCO disagrees with the interpretation of section 272(e)(4) provided by certain BOCs before the United States Court of Appeals for the District of Columbia Circuit. Statutes such as section 272(e)(4) must be read in context of the entire Telecommunications Act, and in context of the legislative intent of the Telecommunications Act. *Amtrak v. Boston and Main Corp*, 503 U.S. 407, 118 L. Ed. 2d 52 (1992). If section 272 (e)(4) were read to be a grant of interLATA authority prior

to receiving 271 authority, then 271 (b)(1) [which prohibits a BOC from providing interLATA service until it receives 271 authority] would be meaningless.

The fact that Section 272 (e)(4) refers to both intraLATA and interLATA services also supports the PUCO's interpretation that Section 272 (e)(4) does not provide the BOCs with a grant of authority to provide interLATA services prior to receiving 271 authority. The BOC's interpretation would have Congress giving them both interLATA and intraLATA authority under Section 272(e)(4). However, BOCs do not need a grant of authority to provide intraLATA, they have always had such authority. Therefore, the BOC's interpretation does not comport with the context of the statute, and should not be allowed.

RESPONSE TO SPECIFIC QUESTIONS POSED BY THE FCC

> **#1:** Section 272(a) states, among other things, that BOCs "may not provide" directly "[o]rigination of [in-region] interLATA telecommunications services." Before the court, the BOCs argued that their reading of section 272(e)(4) does not conflict with section 272(a) because when a BOC provides in-region interLATA telecommunications services on a wholesale basis, it does not "[o]riginat[e]" such services. What does it mean to originate a call? Is the term strictly a retail concept? Commenters are requested to discuss the fact that section 271(b)(1), which prohibits a BOC or its affiliate from providing interLATA services originating in any of its region states prior to FCC approval.

PUCO response: The PUCO maintains that the term "originate" when employed to describe a typical retail call refers to the starting location of an end user call. The PUCO maintains, however, that this type of call origination is not what is intended in section 272(a). Section 272(a) was enacted to continue the prohibition on Bell

Operating Companies from carrying interLATA calls referenced in the Modified Final Judgement in the AT&T Divestiture Decree (MFJ).[1] Under the MFJ, BOCs were permitted to carry only the local portion of calls originated by a BOC customer. Calls directed to another local area were required to be handed off by the local carrier to an interexchange carrier. Used in this context, "originating" a call refers to the beginning location of the portion of the call that crosses the LATA boundary, not whether the call was originated by a wholesale or retail customer. Any other reading would have resulted in a prohibition on the BOC customer from placing a call outside of a LATA. Thus, use of the word "originate" cannot not be looked at entirely in a vacuum and is not at all times a retail concept.

If 272(e)(4) were read to be a grant of interLATA authority prior to receiving 271 authority, then 271(b)(1) [which prohibits a BOC from providing interLATA service until it receives 271 authority] would be meaningless. Both sections 272(e)(4) and 272(a) refer to a situation which would exist after the BOCs have been granted authority from the FCC to provide transport for interLATA calls originated in their respective service areas pursuant to section 271. Congress' use of the word "originating" in section 271(b)(1) further supports the PUCO's interpretation. BOCs already have authority to provide the local portion of a telephone call that does not traverse a LATA boundary. The situations referred to in the entirety of section 271(b)(1)(4) would not have to be addressed if the word "originating" meant other than beginning the interLATA portion of the call.

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1 *United States v. American Tele. & Tel. Co.*, 552 F. Supp. 131 (D.D.C 1982), *aff'd sub. nom. Maryland v. United States*, 460 U.S. 1001 (1983).

#2: What is the legal significance, if any, of the fact that section 272(e)(4) applies to intraLATA services and facilities as well as interLATA services and facilities? Before the court, for example, AT&T argued that the use of the term "intraLATA" demonstrates that section 272(e)(4) is not a grant of authority because, among other things, "a BOC needs no grant of federal statutory authority to provide intraLATA services."

PUCO response: The PUCO maintains that AT&T's argument is correct. Section 272(e)(4) cannot be seen to be a grant of authority since it refers to both intraLATA and interLATA. BOCs do not need a grant of authority to provide intraLATA, they have always had such authority.

#3: Are the principal concerns that underlie the separate affiliate requirement of section 272 -- discrimination and cost misallocation by a BOC -- less serious in the context of the wholesale provisioning of in-region interLATA services to affiliates than in the context of the direct retail provisioning of such services, at least where, as here, any such provisioning is required to take place in a non-discriminatory manner? If they are less serious, are they nonetheless serious enough to justify, as a policy matter, prohibiting such wholesale provisioning? Of what relevance, if any, is the fact that there was no exception to the interLATA services restriction contained in the Modified Final Judgment for wholesale interLATA services provided on a non-discriminatory basis, or that there presently is no wholesale interLATA services exception to section 271's prohibition on the provision of in-region interLATA services prior to FCC approval?

PUCO response: The PUCO submits that the principal concerns that underlie the separate affiliate requirement of section 272 are no less of a concern should the BOC be permitted to provide interLATA services on a wholesale basis. The leverage of local market power through the use of customer information, customer contact, and

joint marketing would be of significant concern. Prior to the thorough scrutiny that will be applied under Section 271 granting of authority, the PUCO would have significant concerns that there would be inadequate assurances and checks to keep the BOC from taking competitive advantage of its market presence. The petitioners specifically state they "already have in place network facilities, skilled workforces, and related support systems that are currently used to provide local telephone service but that could also be used, (emphasis added)" for the provision of long-distance service. Motion for Summary Reversal or for Expedition of Petitioners, *Bell Atlantic et al. v. FCC*, Case No. 97-1067, (D.C. Cir. 1997). It is this very possibility that concerns the PUCO. Without the proper pre-authority scrutiny there is a concern that these facilities that are currently used for local services, and paid for by local rate payers will be used for long distance without proper cost allocation. Such a scenario would harm captive local customers and long-distance competition.

Allowing the BOC to wholesale to its affiliate (especially prior to receiving section 271 authority) has the undesirable affect of rendering all the separate affiliate safeguards meaningless.

The section 271 restrictions on interLATA services make no distinction regarding wholesale interLATA services and other interLATA services. Section 271(a) must be understood to include all interLATA services that are not included in the exceptions directly referred to in 271(a). Section 271 specifically reads: Neither a BOC nor its affiliate "may provide interLATA services except as provided in this section." (emphasis added) Section 271 then goes on to list the specific exceptions to the broad section 271(a) language. Nowhere in section 271 does it say that the

wholesale provision of interLATA services by the BOC and/or its affiliate to the interLATA affiliate is an exception to the broad prohibition in 271(a).

> **#4:** Does the extent of concern for discrimination and cost misallocation depend, at least in part, on the particular kind of in-region wholesale interLATA service a BOC seeks to offer? How would the non-discrimination requirement in section 272(e)(4) apply to these different kinds of wholesale interLATA services? Are there some kinds of services that, in practice, could not be provided in a non-discriminatory manner?

PUCO response: The extent of concern for discrimination and cost misallocation is directly related to the competitive interest level in any particular type of interLATA service or facility. To the degree that the type of services or facilities that the BOC would be wholesaling to its interLATA affiliate are the same type of services and facilities that other interLATA service providers are using to provide interLATA service to their own end users, the concern for discrimination and cost misallocation remains paramount.

The separate affiliate requirements are intended to ameliorate the anti-competitive concerns of the provision of interLATA service by a BOC. Allowing the BOC to provide wholesale interLATA services and facilities to the interLATA affiliate prior to receiving 271 authority exacerbates the anti-competitive concerns.

The Act requires the BOC that offers such services to make them available to all carriers at the same rates, terms and conditions. Yet as a practical matter, other IXCs will not need to buy wholesale interLATA services and/or facilities from a BOC. It does not seem that any of the major competitive IXCs would be in need of BOC services or facilities for the provision of interLATA service. Consequently, the

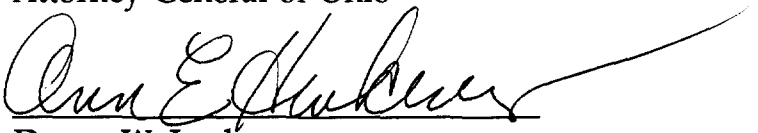
passive check against anti-competitive practice that generally available rates, terms and condition language is intended to create is ineffective in this scenario.

CONCLUSION

In closing, the PUCO wishes to thank the FCC for the opportunity to file comments in this docket.

Respectfully submitted,

Betty D. Montgomery
Attorney General of Ohio



Duane W. Luckey
(Chief, Public Utilities Section)
Ann E. Henkener
Assistant Attorneys General
Public Utilities Section
180 East Broad Street
Columbus, OH 43215-3793
(614) 466-4396
FAX: (614) 644-8764

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